Communiqué

JANUARY, 2004

IN THIS ISSUE:

Hit your Back Button to return to the top of this index.

Regular Columns
President's Report ✣ Benchers' Meeting Highlights ✣ From the Equity Ombudsperson ✣ Allan's Odds and Ends ✣ Membership Changes ✣ In Memoriam

Special Features
Electronic Imaging of Trust Cheques ✣ Federal Privacy Legislation and the Impact on Lawyers ✣ Meta Data Alert ✣ Why Women Leave Practice ✣ Watch Out for CMHC / MHRC Mortgages with First Right of Refusal ✣ Gone Phishing

Notices to the Profession
Notice of Benchers' Meeting ✣ LDRC Grant ✣ Increased Excess Coverage ✣ Interest Rates on Unpaid Fees

PRESIDENT'S REPORT

G. Patrick S. Riley
President

Halfway through my term as President, I am pleased to report no major disasters (touch wood). On the contrary, I have noted some very positive developments in Manitoba's legal community.

Our law school, under the leadership of Harvey Secter, is enjoying a remarkable revitalization. We all benefit from a high quality law school. I thank all the donors who have been so generous in supporting the law school. Please consider joining them if you have not already done so. (Harvey will be knocking on your door soon anyway!)

Our Bar Association, under the leadership of Richard Buchwald, has been doing a first rate job of defending lawyers (and judges). Keep up the good work!

Our civil courts seem to be functioning well. Some exciting innovations to the criminal justice system are forthcoming under the leadership of Chief Judge Ray Wyant.

Our Law Society is enjoying excellent relations with our colleagues across Canada, and our

national organization, The Federation of Law Societies of Canada, has restructured and, in my opinion, is functioning better then it ever has. We were recently visited by the Presidents of the Law Societies of Alberta and Saskatchewan. Our three organizations are cooperating to produce a common bar admission course, a large part of which will be taught online. The emphasis is on proving competence to perform certain practical skills of a lawyer (interviewing, research, etc.) as opposed to teaching substantive knowledge of Manitoba law. Which, of course, brings us back, full circle, to my comments about the importance of having a good law school.

On the national and international front, I am very pleased to announce that our Past President, Lori Spivak, has been elected Vice-President of the Federation of Law Societies of Canada. She will assume the presidency at the November, 2004 meeting, which will be held in Winnipeg.

Lori will continue the tradition of effective Manitoba input into Federation activities. I am sure we all wish her well in her new responsibilities. [Historical Fact: The Federation, like the CBA, was founded largely upon the initiative of Sir James Aikins.]

Finally, I want to take this opportunity to wish all of you all the best in the new year.

Benchers' Meeting Highlights

In Praise of Wine

Allan Fineblit, Q.C.
Chief Executive Officer

When Benchers have a full agenda, it's a good idea to promise them a glass of wine when they finish (on the other hand, a glass of wine before or during the meeting is not at all a good idea!). The Benchers of the Law Society of Manitoba met on December 18, 2003 and completed a very large agenda in remarkably short order and in plenty of time to join the Manitoba Bar Association Council for a joint meeting and holiday reception (read glass of wine).

There were a large number of rule amendments passed. Rules requiring members to maintain general account records and permitting audit access to those records, and rules allowing prepaid legal service plans to operate as "closed panel" plans, which had been approved in principle in October, were approved in final form. They also approved a minor amendment to the mobility rules.

The Benchers approved in principle housekeeping amendments to the Bar Admission Course rules (to make the language consistent with next year's skills-based, online prairie bar admission course); and rules permitting payment of the practising fee in instalments. These changes will be approved in final form in February. The Benchers also made a minor housekeeping amendment to Practice Direction 83-01 dealing with payment for medical reports.

The Benchers received a report on the Law Society's financial situation for next year. It's bleak. We need to absorb the full cost of the law libraries and because revenue is poor from our investments, Benchers were told that this likely means a healthy fee increase (after seven years of fee reductions). A final budget will be presented to Benchers in February.

Benchers reviewed a monitoring report on the activities of the Insurance Department. On the "good news" side, the positive claims experience continues, which hopefully will translate into lower premiums (to take the sting off the practising fee increases). The report also set out the significant growth in claims against lawyers brought by unrepresented litigants. While these are almost always dismissed, the cost of defending these claims is significant (over $120,000 last year).

The Benchers were joined by Rob Gibbings, Q.C., President of the Law Society of Saskatchewan, and Cheryl Gottselig, Q.C., President of the Law Society of Alberta, who, along with Wayne Onchulenko, participated in a panel discussion on the independence of the legal profession at the joint meeting with the Bar Council that followed the Benchers meeting.

Equity Ombudsperson: Learn solutions for workplace accomodation

Brenlee Carrington Trepel
Equity Ombudsperson

This is your official invitation! On Wednesday February 25th, from 12:00 noon - 1:30 p.m. you can come to The Law Society of Manitoba for Solutions for Workplace Accommodation. Hear three terrific panelists, have lunch and receive written materials - all for just $10 for MBA members, students and support staff, $15 for everyone else. The program is co-sponsored by the MBA Constitutional and Human Rights Law Subsection and the Office of the Equity Ombudsperson. All you have to do is to contact the Law Society for registration.

Solutions for Workplace Accommodation
Since the Supreme Court of Canada's landmark decision in Meiorin, employers have an increased responsibility to take active steps in meeting their duty to accommodate. This program will explore how the law has developed since the Meiorin decision. Presenters will provide practical examples of accommodation in the workplace.

You asked for it and so here it is!
You suggested this seminar as a follow-up to last year's successful session on equality issues in the workplace. Our panel comprises three lawyers with impressive knowledge of this area of the law.

Aaron Berg is General Counsel with Manitoba Justice. He's done extensive legal work for the Manitoba Human Rights Commission and will talk about some of the practical accommodation solutions which have been implemented in workplaces.

Grant Mitchell is a partner with Taylor McCaffrey. He'll discuss the challenges of giving practical advice to employers where accommodations are apparently required. Using actual situations, he will address accommodation of addicted employees, those with physical and mental disabilities, and accommodations where the discriminatory ground is not disability. The implications of safety and health obligations on employers will also be discussed, as well as the

impact on other employees and even other bargaining units.

Equality rights lawyer Yvonne Peters told me: "I would like to discuss how Meiorin and subsequent cases have changed the concept of accommodation for persons with disabilities. Prior to the Meiorin case, accommodation was not well understood as a substantive component of disability equality rights. Meiorin has clearly incorporated the duty to accommodate into a substantive interpretation of equality. The bar has been raised and employers must now demonstrate that they have engaged in a thorough process to identify suitable accommodation. I would also like to touch on some practical steps that employers can take when implementing an accommodation process."

The Manitoba Human Rights Commission on Reasonable Accommodation
The Manitoba Human Rights Commission has a fact sheet on reasonable accommodation, and here is an excerpt from it:

Employers, landlords and businesses are required to reasonably accommodate the special needs of individuals where these needs stem from the group factors specified in The Manitoba Human Rights Code (e.g. disability, religion, sex).

Ignoring these needs can result in lost opportunities for employment, housing and services and is simply not good business. Failure to reasonably accommodate special needs is a form of discrimination prohibited by The Code unless the accommodation would create an undue hardship for the business.

MHRC Examples of Accommodation
The Manitoba Human Rights Commission document continues: *"Because the building is not wheelchair-accessible, an employer or landlord is reluctant to consider a person who uses a wheelchair. Reasonable accommodation may involve construction of a ramp and widening a doorway.*

-A business relying on telephone orders by the public innocently denies access to the service by deaf and speech impaired people. Reasonable accommodation may require the purchase of a teletype device for the deaf to enable this population to have equal access to the service.

-An employer hesitates to hire people who are unable to work Saturdays because of their religious conviction. Reasonable accommodation may only call for a more flexible work schedule.

-A company is reluctant to hire a woman into a male work environment because of a lack of washroom facilities. Reasonable accommodation may require providing such facilities or, where not possible, to provide an appropriate unisex facility with sufficient privacy.

-A company refuses to hire a person unable to obtain a driver's licence, due to epilepsy or low vision, for a position requiring occasional travel. Reasonable accommodation may call for re-assignment of work to minimize travel demands or use of alternative means of public transportation.

-A company hesitates to hire people whose religion requires them to wear certain headwear which is in conflict with the dress or uniform code. Reasonable accommodation could require an exemption.

Once a commitment has been made to seriously consider ways to accommodate or to adjust a workplace, a procedure, policy or service, the first person to consult is the person or group requiring the extra consideration."

Exemptions To Accommodation
The Manitoba Human Rights Commission information circular concluded: "The onus is on the employer, landlord or service provider to show that reasonable efforts at accommodation have been made. Accommodation which creates an undue hardship for the business, because of costs or other factors, would be unreasonable, and therefore not required."

I hope you'll come for lunch to hear about **Solutions to Workplace Accommodation** on February 25th at The Law Society of Manitoba.

The Equity Ombudsperson can assist to resolve individual discrimination and harassment concerns; act as a sounding board in dealing with internal office concerns or complaints; provide educational seminars and speaking engagements about respectful workplace issues for legal offices; assist in the development and implementation of policies and procedures.

Contact Brenlee Carrington Trepel confidentially
by phone: 942-2002;
or toll-free 1-866-771-2002;
email: brenleecarrington@shaw.ca;
fax: 474-1161;
mail: P.O. Box 2555-Station Main, Winnipeg, Manitoba, R3C 4B3.

You can also visit the Equity Initiatives site at www.lawsociety.mb.ca/equity.htm

Allan's Odds and Ends

Rocky Pollack cleaned out his basement. He found correspondence dating back to 1929 that was sent to his grandfather from **Monty Israels** reporting on a house deal. Because I am apparently a bigger packrat than even Rocky, he sent the letters along to me. The feel of the stationery, the look of a typewritten letter signed with a fountain pen, and even the five-digit phone number all reflect a different era, but most amazing of all is the disbursement of $1 as a filing fee for the mortgage.

Speaking of real estate matters, congratulations to **Lyle Smordin** who just completed his 35th consecutive year as a member of our faculty teaching the real property segment of the Bar Admission Course.

Thanks to **Doug Steinburg** for finding the "typo of the month". I'm embarrassed to tell you it was in one of the Law Society's own brochures advertising an upcoming CLE program for support staff on how to deal with difficult clients. One of the things the brochure promised to teach is how to use "**tack** and respect" when others are offensive. Works for me.

I thought the big legal news from Steinbach was the removal of the liquor ban, but it turns out an even bigger story is the disappearance of post office box addresses. John Van der Krabben now

claims Smith Neufeld is the only Manitoba law firm with its own postal code. Is he right?

My art collection runneth over. First Doug Paterson sent me a wooden cut-out of "Cliff". Then Harold Buchwald gave the Law Society a statue of a lawyer that looks a lot like Harry Walsh, and now the Law Society has received a beautiful watercolour of the old Law Courts Building from **Victoria Lehman** who donated it in memory of **Knox Foster**.

In February, when Discipline Director Leah Kosokowsky goes on a one-year maternity leave, Discipline Counsel **Richard Porcher** will become Acting Director of Discipline and we are pleased to announce that **Joan Holmstrom** has agreed to join our staff to replace Richard.

Membership Changes

The following members have voluntarily changed their status as indicated on the dates shown:

Practising to Non-Practising:
December 15, 2003 Yvan B. Lagasse

Practising to Inactive:
November 7, 2003 K. Rhodel Ferriss
October 1, 2003 J. Marilyn Pilon
December 1, 2003 Gregory K. Huzel
December 8, 2003 Laurence J.P. Gillespie
December 12, 2003 Sharon I. Reid
December 16, 2003 Louise H. Lien
January 1, 2004 Crystall A.R. Kennedy

Non-Practising to Practising:
November 1, 2003 Charlotte M. McCurdy
December 1, 2003 Kenneth E. Andrews
December 4, 2003 Donald D. Bell
January 1, 2004 Mary M. McGunigal

Inactive to Practising:
November 12, 2003 Lee C. Turner
December 1, 2003 Evelyn M. Braun
December 1, 2003 Rene J. Gantzert
December 9, 2003 Mary E. Switek
December 10, 2003 Gordon B. Shumacher

Transfer from Another Province:
The following members were called to the Bar of Manitoba and are now entitled to practice law in this jurisdiction, having fulfilled the requirements of Rule 5-14.

December 10, 2003 **Candice M. Arnold** from The Law Society of Upper Canada
December 11, 2003 **Jonathan W. McCully** from The Law Society of New Brunswick
December 16, 2003 **Dean B. Head** from The Law Society of Saskatchewan

In Memoriam

David T. Sgayias, Q.C., who passed away on August 24, 2003 at the age of 53. Mr. Sgayias was admitted as a solicitor and received his call to the Bar on June 25, 1976. He began his legal career articling with the Federal Department of Justice in Winnipeg. Immediately following his call he transferred to the Department of Justice in Ottawa where he continued to practise until his death. At the time of his death, Mr. Sgayias was Chief General Counsel. Mr. Sgayias was the author of several legal texts on Federal court practice and Crown liability. He was a member of the Board of Directors of The Advocates Society, the recipient of The Law Society of Upper Canada Treasurer's Medal and the Department of Justice John Tait Award which is given for ethical and professional excellence.

Israel Harold Asper, Q.C., who passed away on October 7, 2003 at the age of 71. Mr. Asper was admitted as a solicitor and received his call to the Bar on July 4, 1957. In 1964 he received his Master of Laws. He spent most of his legal career with the firm Buchwald Asper which he co-founded. He practised and taught law for the next 20 years, specializing in tax law. Mr. Asper served as leader of the Liberal Party of Manitoba for five years, beginning in 1970, and was twice elected to the Manitoba legislature. In 1974 he purchased his first television station. This was the beginning of what would become over the next 30 years an international empire of communication organizations, known today as CanWest Global Communications Corp. In January, 2003, Mr. Asper retired from his position as Executive Chairman of CanWest but continued to serve as Chairman of the Board. In December, 1975, Mr. Asper was appointed Queen's Counsel. In 1995 he was inducted as an Officer of the Order of Canada. In 1998 the University of Manitoba awarded him an Honorary Doctor of Laws and Letters degree and in 2000 Mr. Asper was inducted as a founding member of the Order of Manitoba.

David Edward Bowman, Q.C., who passed away on October 8, 2003 at the age of 72. Mr. Bowman was admitted as a solicitor and received his call to the Bar on June 15, 1955. He began his legal career with the firm, Walsh Micay & Co, where he practised for 11 years. In 1967 Mr. Bowman went into private practice. In addition to practising in the areas of criminal, personal injury and contract litigation, Mr. Bowman also enjoyed a successful career as an arbitrator. In 1994 he left law to practise exclusively as an arbitrator. Mr. Bowman served as a Bencher of the Law Society from May, 1973 to May, 1976. In December, 1983 he was appointed Queen's Counsel and in February, 2001 he was made an Honourary Member of the Law Society. Mr. Bowman was an active member of the Liberal Party and also served as a volunteer to numerous organizations, including the Children's Aid Society of Winnipeg and Meals on Wheels.

Knox Barton Foster, Q.C., who passed away on October 24, 2003 at the age of 64. Mr. Foster received his call to the Bar on May 25, 1964, following which he joined the firm Aikins, MacAulay where he practised law until his retirement in February, 2002. In December, 1979 he was appointed Queen's Counsel. Mr. Foster served as a Bencher of the Law Society for eight years beginning in May, 1978 and in 1982 he was elected President. Mr. Foster was a founding member of the Advocates Society of Manitoba.

Edward Jay Gilson, who passed away on October 28, 2003 at the age of 49. Mr. Gilson received his call to the Bar on June 24, 1993. Over the course of his career, he practised with several firms, including Legal Aid Manitoba, Teskey and Company, Keyser Harris, Myers Weinberg,

and finally Gilson Law Office. Mr. Gilson practised law up to the time of his death.

Raymond Joseph Barrett-Cramer, who passed away on November 12, 2003 at the age of 73. Mr. Barrett-Cramer received his call to the Bar on October 1, 1958. During the course of his career he practised law with the firm Brotman, Cramer & Cramer, was a Deputy District Registrar at the Land Titles Office and also worked at the Manitoba Law School. In 1971 Mr. Barrett-Cramer was appointed a judge of the Provincial Court, where he remained until his retirement in 1999.

William Cooper Gardner, Q.C., who passed away on November 20, 2003 at the age of 81. Mr. Gardner received his call to the Bar on May 27, 1950. He began his legal career with the firm Johnston Jessiman Gardner and then moved to Pitblado & Hoskin in 1971 where he remained until his retirement in 1997. He was counsel to the Public Utilities Board for many years. Mr. Gardner was appointed Queen's Counsel in December, 1963. He served as Chairman and board member of the Health Sciences Centre for many years and was the founding Chairman of the Health Sciences Centre Foundation.

Electronic Imaging of Trust Cheques

Sherri Jack
Director of Audit

Many credit unions have recently changed their process for clearing cheques. Rather than returning the original cancelled cheques with the bank statements, the credit unions return a digitally reproduced copy of the cheques. Electronic images of cheques are not currently an acceptable substitute for the original paper cheques and members are reminded that they must obtain the original cheques with their monthly bank statement so that they may be retained as part of the firm's trust records. Representatives of the four western provinces are currently discussing issues relating to electronic imaging with Credit Union Central.

Please contact any one of the Law Society Auditors if you have any further questions about this issue.

Federal Privacy Legislation and the Impact on Lawyers

Darcia Senft
General Counsel

Members are reminded that effective January 1, 2004, the Personal Information Protection and Electronic Documents Act ("PIPEDA") became applicable to any organization that collects, uses, or discloses personal information in the course of its commercial activities. Even non-profit organizations may engage in some activities that are covered by PIPEDA.

Under PIPEDA, an organization is defined as including "an association, a partnership, a person and a trade union." Therefore, PIPEDA now applies to law corporations, law firms and individual

lawyers. When practitioners collect, use, and disclose personal information, they must do so in compliance with the legislation.

Practitioners must become familiar with PIPEDA in order to properly advise their clients who may be subject to its provisions. Practitioners should also make sure that their own organization has privacy policies that deal with the matters regulated by PIPEDA including designating someone who is to be accountable for the firm's compliance efforts.

If a client makes allegations of negligence as a result of failure to properly advise of PIPEDA's requirements, members are required to put the Director of Insurance on notice of a potential claim.

In the event that a firm receives a complaint regarding its own non-compliance with the requirements of PIPEDA, it would be prudent to advise the Director of Insurance, although the Insurer has not determined whether damages ordered against a law firm as a result of non-compliance with PIPEDA will be covered under the Insurance Policy.

Information about PIPEDA and compliance requirements is available from the web site of the Privacy Commissioner of Canada: http://www.privcom.gc.ca. See also the September, 2003 issue of the Communiqué (which may be downloaded from the Law Society's web site) for an article on PIPEDA or contact the Legal Studies Department of the Law Society to purchase materials from a PIPEDA seminar offered by the Law Society in November, 2003.

Meta Data Alert

Tana Christianson
Director of Insurance

Meta data may sound like the alien villain from a children's television show, but it is something every lawyer and law firm employee who e-mails documents should think about. In word-processing files (such as "Word"), "meta data" is information that is attached to a file and, follows the file everywhere. Meta data provides information relating to the file, including the identity of the author, the disc memory used by a file, and a history of the changes. A relatively unsophisticated computer user can extract this data and review previous changes.

So what, you say? If, like many of us, you don't "re-invent the wheel" with every new document, but build your document on a precedent taken from another file (for example a lease or employment agreement drafted for another client being used as a precedent for the agreement you're working on) and you transmit the file electronically to a third party, that third party can access the earlier version, tracing changes back to the original. This could result in a significant breach of solicitor/client confidentiality, leaving you exposed to complaints to Discipline, litigation and possibly PIPEDA prosecutions.

There are ways to protect yourself from inadvertently transmitting confidential information. Documents can be converted to a PDF format before transmitting them. This will, however, make it difficult for the lawyer receiving the documents to make amendments, which may be a problem if you are in the negotiation and re-draft stage of a transaction. There are also software programs

such as Meta Data Assistant or Meta Data Scrubber and others, which "clean out" the meta data information (leaving the document you intend to send intact). Ask your computer consultant for advice on how to defeat meta data demons and avoid this potential problem.

Why Women Leave Practice

Allan Fineblit, Q.C.
Chief Executive Officer

In September, 2003 I wrote a Communiqué article called "Notes from the Woods" and invited your thoughts on why so many women choose to leave the practice of law. The response was overwhelming and interesting. Most of the responses came from two distinct demographics. Not surprisingly, about half the mail came from women with a long-standing and well-developed interest in equity issues. To my surprise, almost all the other responses came from (sorry guys) middle-aged men. What follows are some excerpts from those responses and just for fun, see if you can identify which were from the men and which from the women. There is a lovely prize for anyone who gets them all right.

1. A colleague of mine and his wife are both in private practice...While the law firm in question "permits" maternity leave, there is no salary protection. As the lawyer approaches her leave date, she needs to start withdrawing from her files and her clients and passing them on. When she returns, she needs to start over again. But if her salary is tied to her billable hours, she will have gone backwards and will have to work extra hard to get back to where she was when she went on maternity leave – at the same time that she has new and significant demands at home with a young child.

2. There are people who like to refer to "societal pressures" that cause individuals to act in a certain way. I tend to think those pressures are really different influences every individual has and are more often family, circle of friends, and cultural influences – all of which are particular to that person. Each of us reacts differently to those influences.

3. I have found that women who choose to spend more than just a few short weeks at home with a new baby and/or maintain a primary role as parent are on the whole much less likely to have significant network contacts or engage in activities which promote networking in the professional and business world...this is a profession which depends on networking because of its very personal nature. We are not just hired guns, we are trusted advisors.

4. I just read your "Notes from the Woods". It contained two answers to why women are not Benchers...golf and weekends away. Most women don't have time for golf and therefore aren't particularly good at it. Moreover, "competitive socializing" is just not most women's idea of fun...then there are the weekends away...younger women still tell me that they get passed over on files that require travel because senior male lawyers don't want to travel with junior female lawyers...on top of the sexual politics, there is the time crunch. It still is easier for a man to leave his kids for the weekend than for a woman to take off and expect him to do the "babysitting".

5. A few years ago...I was ribbing a colleague and asked him what they were doing to the women at his firm. He replied, "They just don't want to work hard." I know he was just razzing me in

response, but I couldn't help but feel that behind that jest was a grain of truth (not that they didn't want to work hard, but that this was the perception of why they left).

6. In her "Touchstones for Change" report, Madam Justice Bertha Wilson addressed the inequity of women's representation in the practice of law. I understand that the Equity Committee of the Law Society of Manitoba was born out of concern for this issue. I think that your article provides a lovely transition into the next stage of the Law Society's "strategic plan" to address this problem.

7. When it comes to women with young families practising law, many women are influenced not by the views of men but by those of women who think their place is at home with their children. How many of our mothers would encourage their daughters to work long hours in order to move ahead in a partnership or buy that new car when there are small children at home.

8. Men – whether of nurturing nature or not – simply never face the reality and stresses associated with maternity leave. There is a big difference between scheduling yourself to be available for Johnny's football and piano lessons and the occasional professional development day and having to deal with everything that goes around pregnancy and maternity leave on top of everything else.

9. ... (a) more significant factor, is the attitude of students graduating from law school...they are not afraid of exploring other possibilities and the market will and does quickly absorb persons with training and talent. And isn't all this what we have been telling our students? Our children?

10. It's much about managing risk – financial risk, emotional risk and risk to the ego. In some ways, women leave because they feel they can...Maybe another way of addressing these issues is to ask not why so many women leave but why so few men do or "is there something that makes it easier for women than men to leave the profession?"

11. I don't think we should apologize for the fact that on the whole, the law requires a devotion to work which is often not compatible with other choices, including raising a family. Lawyers need to give more, it is central to their very function. In life we make choices. Some doors close; others open. What is important is that we make them fully informed, just like we advise our clients.

While everyone who wrote to me was comfortable being quoted, I decided not to attribute names to the quotes if for no other reason than it kind of takes the point out of the "guess the gender" contest. You should also know that I was sent a large number of articles and referred to several books and websites which I'd be happy to share with anyone who would like to receive them. There is a particularly fascinating article written by Lisa Belkin for The New York Times (and a response written by Joan Walsh for salon.com). I wanted to quote a couple of things from the Belkin article:

"...a surprising amount of talk is not about how the workplace is unfair to women, but about how the relationship between work and life is different for women than for men."

"There's a misconception that it's mostly a pull towards motherhood and her precious baby that drives a woman to quit her job or apparently, her entire career...timing one's quitting to coincide with a baby is like timing a break-up to coincide with graduation...it's just a whole lot easier than breaking up in the middle of senior year."

As always, your comments, advice and ideas are most welcome.

Watch Out for CMHC / MHRC Mortgages with First Right of Refusal

Kathleen Craton
Claims Examiner

Aword of caution to solicitors who act on residential real estate sales: if your client is selling a home which was purchased with CMHC financing, the mortgage may give MHRC a first right of refusal to purchase the property at the price offered by a bona fide third party. MHRC now owns the mortgages granted by Canada Mortgage and Housing Corporation under its Rural and Native Housing Program which ran from the late-1970's through to 1994. It was a standard term of those mortgages that CMHC would have the first right of refusal, exercisable within 30 days of notice of a bona fide third-party offer. The mortgage would typically provide, in the alternative, a profit-sharing formula under which the mortgagee would take a certain percentage of the net proceeds from the sale of the property.

Since there's nothing on the face of the title to indicate that the CMHC/MHRC mortgage contains any extraordinary terms, the typical solicitor wouldn't obtain a copy of the full text of the mortgage when acting only on the sale of the property; standard practice would simply be to write to MHRC and request a pay-out statement for discharge purposes. While the prudent solicitor wouldn't give an undertaking on closing to pay out and discharge a mortgage without a discharge statement in hand, the Professional Liability Claims Fund has encountered situations where lawyers with short-notice closings have been pressured into doing just that, gambling that the sale proceeds will be sufficient to pay out the mortgage based solely on the stated principal amount. Obviously, the solicitor would be incapable of fulfilling that trust condition in circumstances where MHRC later exercises its prerogative to purchase the property.

Far too many of the large indemnity payments made by the Claims Fund go towards the discharge of title encumbrances which lawyers neglected to fully investigate before closing. Naturally, when the lawyer doesn't discover until after closing that the sale proceeds won't cover the amounts due under the mortgage, or that the mortgagee has some other right or grievance against the vendor and won't agree to give a discharge, there's not much basis for resisting a claim. The lawyer, by then, has become personally bound by trust conditions to discharge the encumbrance. The Claims Fund has no real alternative but to buy the mortgage and hope for the best in its efforts to later collect from the vendor.

The surprise first right of refusal in the CMHC/MHRC mortgage just underscores the need for extreme care in assuming any obligation to clear title on your clients' behalf. Never proceed into a closing without absolute certainty of what it will take to get a discharge. For a refresher on the recommended practices for settling discharge terms on various types of encumbrances, see Part D, paragraph 3 of the Western Law Societies Conveyancing Protocol (Manitoba).

Gone Phishing

Alan Pollard
Director of Technology

Phishing is a term coined to refer to emails which attempt to trick people to revealing passwords and PIN numbers. The usual mode is an email that seems to come from a bank or other financial institution which asks you to confirm information or some similar request. The email has a link in it which takes you to a website which has been built to look like the site that you would expect. A normal looking "Enter Your Account Number and Password" box appears but the site is actually fake and collects your information for the purpose of gaining access to your account. A couple of lawyers have contacted us indicating that they were victimized by this kind of scam recently. Real financial institutions don't send out mass emails asking you to log in and confirm things, so be immediately suspicious if you get one.

Notice of Benchers' Meeting

The next meeting of the Benchers of The Law Society of Manitoba will be held on **Thursday, February 5, 2004 at 12:30 p.m.** in the Society's classroom, 219 Kennedy Street, Winnipeg, Manitoba. Members of the Society are encouraged to attend and participate in the deliberations of the governing body.

LDRC Grant

A big thank you to the Board and staff of the Legal Data Resources Corporation for agreeing to provide a $10,000 grant to the Law Society to fund the completion of an online library catalogue. This catalogue will let you know what is available at the Great Library and the regional libraries in The Pas, Thompson, Dauphin and Brandon.

Increased Excess Coverage

If you (or your clients) have been wondering whether your $1 Million compulsory insurance is enough to protect you from potential claims, you may want to consider purchasing excess insurance. Excess professional liability insurance limits of up to $9 Million are available though the Canadian Lawyers Insurance Association.

For more information on how to apply for excess insurance or increase your current limits, please contact Bonnie Harvey at The Law Society of Manitoba at (204) 926-2026.

Interest Rates on Unpaid Fees

Pursuant to Rule 5-57 of the Rules of The Law Society of Manitoba, a lawyer is entitled to charge interest on unpaid fees, charges or disbursements where the lawyer and client have so agreed. Such interest is calculated from a date that is at least one month after the date the bill is delivered to the client.

The rate of interest that may be charged shall not exceed the rate established under Section 161 of the Income Tax Act (Canada) on the date the bill is delivered. The interest rate effective for the period January 1, 2004 to March 31, 2004 is 7%.

COMMUNIQUÉ BACK ISSUES

September, 2003
May, 2003
January, 2003
September, 2002
May, 2002
February, 2002
November 2001
July 2001
December 2000
September 2000
May 2000
January 2000
October 1999
May 1999
January 1999
September 1998
May 1998